

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The Utility Consumers' Action Network,

Complainant,

v.

Pacific Bell Telephone Company and
AOL-Time Warner, Inc.,

Defendants.

Case 02-07-044
(Filed July 24, 2002)

**ADMINISTRATIVE LAW JUDGE'S RULING
DENYING PACIFIC BELL'S MOTION TO FILE UNDER SEAL**

1. Summary

Pacific Bell Telephone Company, now SBC California (SBC) moves to file under seal the results and preliminary analysis of a six-week customer survey it conducted in this proceeding. The information is likely to be significant in the Commission's consideration of this case, and SBC has failed to meet its burden of showing that disclosure will cause competitive disadvantage to SBC.

Accordingly, SBC's motion to file under seal is denied.

2. Background

The Utility Consumers' Action Network (UCAN) filed this action against SBC and AOL-Time Warner, Inc. (referred to herein as AOL¹) on July 24, 2002, alleging that AOL Internet subscribers are being subjected to unauthorized toll charges on their telephone bills as a result of the actions of SBC and AOL. Specifically, UCAN alleges that the one or both defendant companies reroute or otherwise convert telephone calls of their customers from local telephone numbers to toll numbers when customers attempt to dial up their Internet Service Provider (ISP). The complaint alleges that toll charges for such dial-up calls can mount to hundreds of dollars before customers receive their phone bills and learn that their Internet dial-up number was not toll-free.

SBC and AOL timely filed answers denying the allegations of the complaint. AOL states that it supplies lists of dial-up numbers to its subscribers and cautions the subscribers to check with their local phone company to be sure the numbers that they select are local calls. SBC states that toll charges for calls to ISPs should be borne by customers because they have exclusive responsibility for selecting the number to be dialed and the computer equipment that actually dials the number.

AOL on October 21, 2002, moved for a dismissal of the case against it on grounds that the Commission lacks jurisdiction over ISPs. UCAN opposed the motion in a response dated November 5, 2002. AOL was permitted to reply to the response and did so on November 15, 2002. Action on the motion was stayed while SBC conducted a customer survey that the parties hoped might lead to

¹ AOL-Time Warner is the parent company of its internet service provider subsidiary, America Online, Inc. For simplicity, this ruling refers to the two entities as AOL.

settlement. At the request of the parties, the Commission in January of this year extended the statutory deadline for resolution of this case to accommodate the settlement discussions.

SBC on May 19, 2003, moved to dismiss the complaint against it on the basis that its customer survey, conducted over the course of six weeks, proves conclusively that SBC is not at fault when its customers place what they thought would be a free call to an ISP and instead incur toll charges. UCAN opposes SBC's motion to dismiss.

SBC also has filed a motion to file under seal the results of the customer survey conducted in this case. UCAN opposes the motion to file under seal.

A prehearing conference was conducted on June 4, 2003, at which time the parties jointly requested a further stay of two months so that they could continue discussions among themselves. Both AOL and SBC requested that no ruling issue on their motions to dismiss until after the two-month period. A second prehearing conference was conducted on August 13, 2003, at which time it became apparent that settlement was unlikely. An evidentiary hearing has been scheduled. SBC's motion to file under seal is denied for the reasons set forth below.

3. Positions of the Parties

In its six-week customer survey, SBC sought to learn the approximate number of customers who unintentionally incurred toll charges when they dialed up their ISP. SBC also sought to learn, through brief interviews of a number of those customers, how they had obtained the toll number that was dialed, and how they corrected the problem once they learned that they were being charged for their ISP calls.

The results of the SBC survey were shared with UCAN and AOL after they signed non-disclosure agreements. The results also were filed under seal in this proceeding, along with SBC's motion to maintain the confidentiality of those results.

SBC states that its survey results are confidential information protected by the California Public Records Act, Gov. Code §§ 6250, et seq., and General Order (GO) 66-C. SBC states that disclosure of the information will place SBC at an unfair business disadvantage by virtue of the potential for competitors to use the information for their own purposes, including giving competitors the ability to benchmark their own results against SBC's results or as a potential marketing tool for those customers that use ISPs.

UCAN argues that state law and Commission policy have long favored public disclosure in the regulatory process. It states that the test employed by the Commission in motions to keep data out of the public record is a demonstration by the proponent of imminent and direct harm of major consequence. (*Re Pacific Bell* (1986) 20 CPUC2d 237.) UCAN asserts that SBC has failed to show how the survey data could be used by a competitor in a way that unfairly harms SBC, adding, "Pacific asserts that the study it conducted proves to this Commission that it, and presumably no local carrier, is responsible for ISP dial-up charges. What value does this provide to competitors?"

4. Discussion

The California Public Records Act and GO 66-C address the necessity of filing certain types of information under seal. The purpose of the Public Records Act is to provide "access to information concerning the conduct of the people's business" while counterbalancing the "right of individuals to privacy." (Gov. Code § 6250.) In accordance with its stated purpose, the Public Records Act

permits agency withholding of the record only when “on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.” (Gov. Code § 6255.)

As UCAN points out, one of the Commission’s most detailed analyses of the balancing of the public interest in an open process with a utility’s desire to shield information from disclosure was a case involving Pacific Bell. (*In re Pacific Bell* (1986) 20 CPUC2d 232.) In that case, the Commission stated:

PacBell must understand that in balancing the public interest of having an open and credible regulatory process against its desires not to have data it deems propriety disclosed, we give far more weight to having a fully open regulatory process. (20 CPUC2d at 257.)

The standard applied by the Commission is a stringent one. The mere fact that SBC calls a statement or a document “proprietary” does not make it so. In the *Pacific Bell* case, the Commission stated:

Certainly there are times to be concerned about full disclosure of proprietary data. Classic examples are customer lists, true trade secrets, and prospective marketing strategies where there is full blown – and not peripheral – competition. To make the assertion stick that there are valid reasons to take unusual procedural steps to keep data out of the public record (e.g., sealed exhibits, clearing the hearing room, or sealed transcripts), there must be a demonstration of imminent and direct harm of major consequence, not a showing that there may be harm or that the harm is speculative and incidental. (20 CPUC2d at 252.)

SBC has shown little more than speculation as to the competitive harm that may result from disclosure of this data. That potential harm must be balanced against the public interest in the information. The public interest here is compelling. SBC’s study shows some glimpse into the scale of the ISP toll call

problem. It shows that the scale of the problem is perhaps larger than anyone realized. It suggests simple steps on the part of consumers, ISPs and local exchange carriers that may reduce the problem of unintended toll calls to ISPs.

Finally, as a practical matter, it is difficult to see how the Commission can consider SBC's motion to dismiss this complaint on the basis of the survey results – while at the same time withholding disclosure of the survey results. If the Commission were to grant SBC's motion to dismiss, its decision presumably would have to delete the factual basis upon which dismissal was granted. That does not conform to the intent of the Public Records Act or GO 66-C.

IT IS RULED that the Motion of Pacific Bell Telephone Company for Leave to File Under Seal Confidential Materials in Pacific Bell Telephone Company's Unredacted Motion to Dismiss, Namely Results and Content of a Propriety Analysis, Declaration of Mr. Jerry Flynn and the Entirety of This Motion to Seal, is denied.

Dated August 14, 2003 at San Francisco, California

/s/ GLEN WALKER

(by Lynn Carew)

Glen Walker

Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Denying Pacific Bell's Motion to File Under Seal on all parties of record in this proceeding or their attorneys of record.

Dated August 14, 2003, at San Francisco, California.

/s/ ELIZABETH LEWIS

Elizabeth Lewis

N O T I C E

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